

REMARKS

Applicants acknowledge receipt of the Examiner's Office Action, with thanks, dated August 15, 2006. This Office Action rejected claims 1-6, 9-11, 13, 14, and 18. The Examiner indicated that claims 7, 8, 12, 15, and 16 are allowable if rewritten in independent form, including all of the limitations of the base claim and any intervening claims. Applicants are grateful to the Examiner for his indication of allowable subject matter. In light of the following remarks, Applicants respectfully request the Examiner's reconsideration and reexamination of all pending claims.

Claims 1, 5, 9, 13, 14, and 18 stand finally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 9, and 12 of U.S. Patent No. 7,028,156 (the 156 Patent) in view of U.S. Patent Publication No. 2004/0205298 filed by Bearden et al. ("Bearden"). The instant application is a continuation-in-part of the 156 Patent. This final rejection mirrors the non-final rejection in the Office Action dated May 22, 2006. Applicants asserted that the non-final rejection was improper in the response filed June 30, 2006. Applicants reassert the arguments of their June 30, 2006, response.

The Final Office Action asserts the nonobviousness-type double patenting rejection of these claims 1, 5, 9, 13, 14, and 18 is proper, citing MPEP 804(II)(B)(1) in support thereof.

Specifically, this cited section of the MPEP states:

A double patenting rejection of the obviousness-type is “analogous to [a failure to meet] the nonobviousness requirements of 35 U.S.C. 103” except that the patent principally underlying the double patenting rejection is not considered prior art. *In re Braithwaite*, 379 F.2d 594 USPQ 29 (CCPA 1967). Therefore any analysis employed in an obviousness-type double patenting rejection parallels the guidelines for analysis of a 35 U.S.C. 103 obviousness determination. *In re Braat*, 937 F.2d 589, 19 USPQ2d 1289 (Fed. Cir. 1991); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985).”

Presumably, the Office Action relies upon the foregoing to combine the 156 Patent with Bearden to arrive at a 35 U.S.C. § 103 obviousness determination. However, MPEP 804 states that double patenting results when the right to exclude granted by a first patent is unjustly extended by the grant of a later issued patent or patents. Before consideration can be given to the issue of double patenting, two or more patents or applications must have at least one common inventor and/or be either commonly assigned/owned or non-commonly assigned/owned but subject to a joint research agreement. Bearden does not have a common inventor with the instant application, nor is Bearden commonly assigned/owned or non-commonly assigned/owned but subject to a joint research agreement. Accordingly, Bearden cannot be considered in a non-obviousness type double patenting rejection. As such, the final rejection has failed to provide a basis for rejecting claims 1, 5, 9, 13, 14 and 18.

Claims 1-6, 9-11, 13 and 18 were provisionally rejected on the grounds of nonstatutory double patenting over claims 1-4, 8, 14-17, and 23 of copending application no. 10/742,129

(the '129 application) in view of Bearden. This rejection mirrors the non-final rejection set forth in the Office Action dated May 22, 2006. Applicants responded to that rejection in their June 30, 2006 Response. Applicants reassert their arguments of the June 30, 2006 Office Action Response. Further, Applicants assert the rejection of these claims is improper for the same reason that the rejection of claims 1, 5, 9, 13, 14, and 18 above are improper. Namely, Bearden does not have a common inventor with the instant application, nor is Bearden commonly assigned/owned or non-commonly assigned/owned but subject to a joint research agreement. Accordingly, Bearden cannot be considered in a non-obviousness type double patenting rejection. As such, the final rejection has failed to provide a basis for rejecting claims 1-6, 9-11, 13, and 18 are patentable.

Claims 1, 5, 6, 9, and 18 stand provisionally rejected on the ground of nonstatutory double patenting over claims 24, 25, 32, and 41 of copending application number 11/242,216 (the 216 application). This is the same rejection in the May 22, 2006 Non-Final Office Action. Applicants argued this rejection was improper in their June 30, 2006 Office Action Response. Applicants reassert their arguments of the June, 30 2006 Office Action Response. Additionally, Applicants note the statement on page 14 of the Final Office Action which sets forth that claim 24 of the '216 application anticipates, and therefore renders obvious, claim 1 of the instant application. In response, Applicants note that double patenting, whether statutory or non-obviousness type, requires complete identity or obvious identity, respectively, of all limitations between the claims at issue. Limitations of claim 1 of the instant application do not have complete or obvious identity to corresponding limitations claim 24 of the '216 patent application. The same arguments can be made with respect to claims 9, and 18 of the instant application.

CONCLUSION

Applicants submit that all claims are now in condition for allowance, and an early notice to that effect is earnestly solicited. Nonetheless, should any issues remain that might be subject to resolution through a telephonic interview, the Examiner is requested to telephone the undersigned.

I hereby certify that this correspondence is being deposited with the United States Postal Service as First Class Mail in an envelope addressed to: Mail Stop AE, Commissioner for Patents, P. O. Box 1450, Alexandria, Virginia, 22313-1450, on August 29, 2006.



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8/29/06

Date of Signature

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